UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-1334, 02-1335, 02-1369

ALDWORTH COMPANY, INC.

Petitioner/Cross-Respondent

and

DUNKIN' DONUTS MID-ATLANTIC
DISTRIBUTION CENTER, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 1360

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petitions of Aldworth Company, Inc. ("Aldworth") and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. ("Dunkin'") (collectively, "the Companies") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Companies. The Board's Decision and Order issued on September 30, 2002, and is reported at 338 NLRB No. 22. (SA62-162.)[1]

The Board had subject matter jurisdiction over the unfair labor practice proceeding under the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Order is final under Section 10(e) and (f) of the Act. Aldworth and Dunkin' filed petitions for review on October 31, 2002. The Court consolidated the cases on November 6, 2002. The Board filed its cross-application for enforcement on December 4, 2002. All filings were timely, as the Act imposes no time limits on such filings. On January 9, 2003, the Court granted the motion of United Food and

[1] "A" references and "SA" references are to the appendix and the supplemental appendix prepared by the Companies. "SSA" references are to the supplemental appendix in the back of this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Commercial Workers Union Local 1360 ("the Union") to intervene on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Aldworth and Dunkin' are joint employers of the unit employees.

2. Whether the Companies are precluded from challenging several of the Board's findings that they violated Section 8(a)(1) of the Act by numerous threats, promises, and other coercive acts in response to the Union's organizing campaign and whether substantial evidence supports the Board's findings concerning the remaining Section 8(a)(1) violations.

3. Whether substantial evidence supports the Board's findings that the Companies violated Section 8(a)(3) and (1) of the Act by discharging, auditing, suspending, and transferring employees because they engaged in union activity.

4. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a)(3) and (1) of the Act by implementing a new selection accuracy program in retaliation for warehouse employees' support for the Union and by discharging seven employees pursuant to that program.

5. Whether the Board reasonably exercised its broad discretion in ordering Aldworth to bargain with the Union as a remedy for its unfair labor practices.

6. Whether substantial evidence supports the Board's finding that Aldworth violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the bargaining agent representing its unit employees, and by unilaterally implementing a new selection accuracy program and discharging employees pursuant to that program.

RELEVANT STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the addendum at the end of this brief.

STATEMENT OF THE CASE

Based upon a series of unfair labor practice charges, the Board's General Counsel issued a complaint against Aldworth and Dunkin'. The complaint alleges that the Companies are joint employers of drivers, warehouse employees, and other unit employees at a Dunkin' facility and that they committed numerous violations of the Act. After a hearing, the administrative law judge issued a decision finding that the Companies were joint employers and that they had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by numerous unlawful statements and actions; violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by unlawfully auditing, suspending, transferring, and discharging employees, and implementing a new selection accuracy program; and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the

Union and by unilaterally implementing the new selection accuracy program. The judge further found that the unfair labor practices warranted a remedial bargaining order. The Companies filed exceptions and the General Counsel filed cross-exceptions.

The Board issued a Decision and Order affirming the judge's findings with respect to joint employer status and the violations of Section 8(a)(1) and 8(a)(3) of the Act, and finding certain additional violations. The Board also affirmed the judge's findings with respect to the violations of Section 8(a)(5) of the Act. The Board adopted the judge's recommended remedial bargaining order, but limited it to Aldworth. The Board also severed and remanded to the judge for further hearing the issue whether certain employees were unlawfully terminated.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Aldworth Supplies Labor to Dunkin′

Dunkin' distributes products to Dunkin′ Donuts shops from its distribution center ("the facility") in Swedesboro, New Jersey. Dunkin′ owns the facility and delivery vehicles. Aldworth leased 63 drivers and 40 to 45 warehouse employees to Dunkin'. (SA85-86;A670-71,9,133,409,493,574-75.)

In the hiring process, Dunkin′ Transportation Manager Thomas Knoble received the road test results of applicants for Aldworth driver positions and

occasionally administered the test. Knoble also interviewed driver applicants. At times, Knoble indicated displeasure with the applicant and the applicant was not hired. Dunkin′ Warehouse Supervisor Warren Engard tested warehouse job applicants with a mock item-selection procedure and gave Aldworth Operations Manager Frank Fisher his opinion. (SA87;A119,122-23,134,135,140,217-20,224-25,226-28,504-07.)

Dunkin′ could request that Aldworth terminate an employee for good cause. Fisher consulted Dunkin′ managers regarding employee terminations, and Dunkin′ was always "either aware of or involved" in such actions. (SA88;SA14,A520-21.) On one occasion, Engard personally fired an Aldworth employee. (SA65n.20,SA 28;A322.)

Dunkin′ determined the exact Aldworth employee wage and benefit rates by specifying, in the parties′ "cost plus" lease agreement, the rates for which it would reimburse Aldworth. (SA86,88;SA14,A576-77,890,895.) When Dunkin′ told Aldworth it would no longer endorse an employee bonus program, the program was discontinued. (SA86;A890,893.) Dunkin′ Manager Knoble developed, in significant part, the rating categories used to determine whether Aldworth drivers received incentive awards. (SA96;A480-84.)

Dunkin′ assigned Aldworth drivers to their particular vehicles, and to their shifts and delivery routes, which Dunkin′ established. It also created and adjusted

the manifests used in delivering merchandise. Knoble also made related assignments, such as special deliveries, granted or denied driver requests for time off, and met with individual drivers to discuss matters such as their logbooks or equipment. (SA88-90;A18-19,80-84,160-61,413-14,419,488-89,490-91.) Engard scheduled the warehouse employees for several months beginning in January 1998 and determined the days on which employee suspensions would be served. (SA90;A302-05,509-12,914.)

Knoble directed Aldworth Field Supervisor Daniel Hoffman in his day-to-day duties. Knoble told Hoffman which drivers to accompany on their routes and provided Hoffman with a Dunkin′ form to review the performance of the drivers. Drivers with problems met with Knoble and Hoffman, who understood that Knoble was in charge of all the drivers. (SA93;A109,111,112-18.) Knoble regularly reviewed the drivers' manifests to determine whether drivers were making deliveries in accordance with the time schedules indicated on them. Knoble also posted instructions and directives to drivers on such matters as how to service their routes, treat their equipment and handle their paperwork, and which highway to take. (SA95,A60-61,114,430-34,442-51,457-64,899-913.) Knoble investigated vehicle accidents and met with Aldworth officials to decide whether the accident was preventable. (SA91,92;A20,64-66,83-84,105,108,386,410-12,472-73,525-26.)

Knoble handled complaints from Dunkin′ Donuts store owners about Aldworth drivers, taking direct action with the driver or informing Aldworth of the action he expected it to take. He later "signed off" on the action taken, sometimes after discussing it with Aldworth Manager Fisher. (SA97-98;A62-63,106-07,132,146-49,474-79,516-19,1317-18.) He also handled telephonic complaints about drivers from other motorists, speaking directly to the driver and determining, alone or with Fisher, the level of management action to be taken. (SA96;A470-71,918-30.) Engard worked with Aldworth supervisors to solve warehouse employee problems that caused owner complaints. (SA98;A496-503.)

During the 1998 pre-election period, Dunkin′ was involved in about 25 percent of the disciplinary actions taken against Aldworth employees. (SA96;A527-28.) Fisher consulted with Dunkin′ officials concerning discipline of a "delicate" nature, such as a lengthy suspension. (SA95;A520-24..) Knoble suspended one employee directly and gave oral warnings to others. (SA95;A162,163-65,919,921,922.) Dunkin′ Manager Michael Shive warned another employee about an infraction and then sent him home. (SA95;A178-80,184-86.) Knoble gave instructions or information to Hoffman on the two occasions when Hoffman disciplined an employee. (SA95-96;A109-11,124-30,136-37.)

Knoble filed Dunkin′ "incident reports" documenting instances of poor performance or misconduct, some of which indicate direct contact between Knoble and the driver involved. Others show that Knoble's incident reports resulted in disciplinary action by Aldworth and the placing of the incident report in the employee's file. (SA90;A435-36,456,465-69,529-30,1212-17,1220-21,1223-26,1230-31,1240-41,1246-47,1264-65.) Engard has also reported incidents that resulted in disciplinary action. (SA94;A1029,1245.)

B. The Union Organizing Campaign; the Companies' Response

In early 1998, the Union began an organizing campaign among the Aldworth employees at the Dunkin′ facility. (SA62,101;A10-12,13-14.) On April 11, Alworth Vice President Kevin Roy held the first in a series of mandatory meetings with employees in which he discussed the Union and related matters. (SA102;A392.)

On May 8, Roy distributed a letter to the employees discussing the "concerns brought up at our meeting on April 11." The letter discussed 21 employee complaints about working conditions and Aldworth's plans to respond with improvements. It also advised that Aldworth had created an "Issue Report Form" that "will guarantee you a response in writing to any and all of your concerns." (SA103-04;A758,141-43.)

On June 16, Roy sent the employees a memorandum asking them to report to Aldworth if they were "harassed" or "bothered" by union supporters. (SA106-07;A764,141-43.) Also on June 16, the Union formally notified Aldworth of its organizing campaign. (SA109;A734.)

In June, August, and September, Roy held additional meetings to discuss the Union. On June 27, Roy held up a blank sheet of paper and told the employees that this was where they would start bargaining if they selected the Union. He also said that Aldworth could lose its contract with Dunkin′ and be underbid by a competitor who might not have to recognize the Union, in which case they would be out of work. Roy also stated that he was looking into the possibility of increasing wages and benefits. He also urged the employees not to "grab onto" somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job, a reference, respectively, to union supporters Leo Leo and William McCorry.[2] (SA66-67,107-08;A27-32,89-93,96-101,143-45,151-56,175-77,190-93,353-56,358-60,365-68,591-92.)

On June 29, Fisher told McCorry that he was suspended until further notice for "falsifying" his driver manifest and logs. (SA135-36;A36-45.) The suspension

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[2] Leo had solicited employees to sign union authorization cards and been seen by a supervisor wearing a union pin, and had said "That's your opinion" when Fisher said they did not need a union. (SA126-27,132,134;A77-78,85-86,87-88.) McCorry had a union bumper sticker on the vehicle he drove to work, and wore and displayed union pins. (SA135;A24-26,726.)

was based on a report by Dunkin′ Manager Shive, who had decided to follow McCorry on his route and allegedly observed irregularities. (SA136-39;A425-26.)

Roy later told McCorry that he was glad that he had decided not to fight the discipline, that McCorry had seen what happens when you "fight these things," and that he, Roy, did not like having to sit at meetings with people who work for his company wearing union buttons. McCorry told Roy that the employees would think his suspension was for union activities. Roy replied that it was McCorry's job to convince them otherwise and that he should admit that he was wrong and got caught. Roy said, "We don't need a union here," added that he had tried to deal fairly with the employees, and told McCorry to explain that to the other employees. McCorry later told Fisher he was through supporting the Union. (SA136;A45-48.) On July 1, Aldworth sent McCorry a memo confirming that he was suspended for 5 days. (SA136;A766.)

On July 1, Aldworth terminated Leo due to a "continual pattern of attendance related failures," stating that during 1997 there were "13 documented incidents," including 4 written warnings, 2 1-day suspensions, and 1 3-day suspension. It further stated that, in 1998, there had been three "lates" and two "call outs," in which an employee calls in to say he or she will not be in that day. (SA132;A866.)

On July 28, the Union stated in a letter to Aldworth that it represented a majority of unit employees and requested recognition; on July 30, Aldworth declined the request. (SA62;A736-37.) On August 11, the Union filed a representation petition with the Board, and on August 12, entered into a stipulated agreement with Aldworth providing for an election. (SA62,101-02;A634-35.)

In mid-August, Aldworth Supervisor David Mann told union supporter Kenneth Mitchell that if Dunkin′ cancelled its contract with Aldworth, Dunkin′ was ready to bring in people who could take over the operation of the facility and avoid a shutdown. (SA127;A197-99.)

In late August or early September, Operations Manager Fisher and Supervisors Mann and Henderschott told various employees, including Douglas King, to remove their union T-shirts and threatened to write them up for wearing them. (SA128;A200,212,214,228,339,379-81.) In August and September, Fisher and Shive asked employee Anthony Meduri to take off his union pin. (SA128,129;A169,170.)

At Roy's August 29 meeting, Aldworth President Ernest Dunn urged employees to express their opinions, and said that Aldworth would "work on them." Roy said he was going to hire a dispatch supervisor for the employees to talk to about their complaints, invited them to apply for the position, and announced the September 14 hiring of a regional operations manager who could

"authorize requests." Roy told the employees that the drivers would no longer have to perform their runs at less than 100 percent of allotted time, that he would limit their contact with Knoble, that the bidding process needed to be restructured, that Aldworth could adjust the time clock to allow more flexibility, that other issues were being resolved through the issue reports, and that he could "make things happen." Roy also said that the Union's organizing effort had been a "wake up" call for Aldworth, that things were going to change and that he hoped the employees would "see something" by September 14 or 19 (the day of the election). (SA109-11;A675,678-79,681,682,683,687,693-94,696.)

Roy also described how Aldworth had gotten Dunkin′s business by supplanting a competitor whose union contract had raised its charges to a level that Dunkin′ refused to pay. He again indicated that bargaining would start with a blank sheet of paper. Roy said that the Union could not do any more for the employees than he could, "[not] a god-damn thing--unless I say so." Roy also told employees that what came out of the June 27 meeting was one termination and one suspension, a reference to the actions taken against Le and McCorry. (SA110-11;A676,677-78,688-89,696.) After the meeting, Roy told employee Meduri that Meduri's wearing of a union pin would be one of the reasons he would "not be working here." (SA128;A169,170.)

On September 1, 3, 8, and 10, Roy held more meetings. On September 1, he reminded the employees of his earlier promise to put people in place to resolve their issues, and said that every company needs a little wake-up call every now and then. He also said that no person "outside this room" was going to help him make things better and that he was not going to learn from union representatives. (SA113-14;SA7-9,A596.) On September 3, Roy urged employees to "come forward" regarding desired changes and said he was still trying to find out what their "major issues" were. He promised to address problems in the company health plan and repeated his earlier promise regarding route time requirements and that he would resolve their complaints about Knoble and ease the work requirements of the warehouse employees. He also repeated his earlier statements that they could lose their jobs if labor costs resulting from unionization cost Aldworth the contract. (SA67,115-16;A682,689-90,695,697-99,700-01,702,703-04.)

On September 8, Roy repeated that Knoble's route speed requirement no longer applied, asked an employee to tell him what issues had led to the organizing effort, and repeated that bargaining would begin with a blank sheet of paper. (SA17-18;A705,706,707-08.) On September 10, Roy mentioned his earlier references to changes that were going to take place, told employees they could talk to him or other company officials about problems, announced that he had resolved an earlier grievance about medical coverage, and reminded the employees of the

new dispatch supervisor position. Roy also commented that the employees seemed more "quiet" and "concerned" and possibly more "afraid to speak" than before, adding that the two union "poster boys" who "incited this whole thing" were starting to have second thoughts. (SA76,119;A709,710-11.)

In early September, Supervisor Henderschott told employee Williams that if the Union came in, it would strike, and that they had a team waiting to come down and take over the jobs of the strikers. (SA129;A369.) On about September 10, Dunkin′ Supervisor Engard, who was going to be on vacation during the September 19 election, told employee McCorry, "Don't let the doors be locked when I get back." (SA130;A54,494,508.) On about September 13, Aldworth Supervisor Kevin Donohue told employee Williams that the employees were going to screw themselves if the Union got in. (SA129;A370,382.)

A few days before the September 19 election, Henderschott told employee Aaron Lewis he could not wear a "Union no" T-shirt at work. (SA128;363-64.)

On September 15, 16, and 17, Roy held additional meetings. On September 15, Roy introduced newly hired Regional Operations Manager Timothy Kennedy, who invited questions and promised answers. Roy told employees that "reinforcements have arrived," that Knoble was "out of the picture," and that a lot of things were going to change and "be nice." Roy also stated that Aldworth's 401(k) plan would be "gone" if they had the Union's pension plan, and reminded

the employees that they should "think about where we have to start" in collective bargaining. (SA120-21;A712-13,714,715-16.)

On September 16, Roy said that if there was a union, the employees would have the union pension plan and would have to "forget" Aldworth's 401(k) plan. (SA122;A717,718-19.) On September 17, Roy urged the employees not to be "shy" and to "come forward" regarding "issues" with matters such as pay, benefits, or problems with Knoble, said he had taken Knoble "out of the equation," mentioned the new operations manager and supervisory position, and said that employees with the Union's pension plan would have to forget the 401(k). Roy explained the election procedures and asked the employees to vote "No." (SA124-25;A720,721-22,723,724-25.)

On September 17, Operations Manager Fisher told employee Jesse Sellers that Aldworth had always worked with employees concerning their need for a day off. He added that, depending on what happened that Saturday (the day of the election), Aldworth might not be able to do that. (SA130;A202,289,311.)

Later that day, Aldworth Supervisor David Mann told warehouse freezer employees Sellers, Moss, Shipman, and Mitchell that if the Union won, they would lose their flexibility in shift start and finish times and break periods, and might have to work at times in other warehouse areas. (SA130;A203,214-15,235,277, 282,291,309-310,557-59.)

On September 19, the election was held. The Union lost by a vote of 48 to 45, with one challenged ballot. The Union filed objections to the election, alleging that Aldworth engaged in misconduct affecting the election's results. (SA102,157;A640-48.)

In early October, Operations Manager Fisher told prounion employee Douglas King that King's standing with Aldworth made Fisher's normal grant of a company boot allowance questionable. (SA131;A171,173.) In late October or early November, Supervisor Henderschott told employee Moss he was going to write him up for wearing a union T-shirt. (SA128;A233-34.)

On October 10, Aldworth changed its selection accuracy policy ("SAP"), which it uses to keep track of warehouse employee selection errors during a 1-week period. Under the old SAP, when a certain error point level was reached, discipline was imposed, and every *increase* in point values resulted in the next disciplinary step. Under the new SAP, employee discipline was based on the *number* of points rather than the number of *increases* in points, making employees subject to discharge after 3 weeks rather than after the 6 weeks required under the old SAP. (SA69,148;A916-917,396-406,SA4-6.)

Aldworth used the new SAP to terminate 10 employees during the first 4 months of its operation. (SA70;SA47-50,53-61,A939-40,944,977-80,1703-07,1713-24,1726-28,1728-36,1737-62,1763-67,1784-89,SSA6,7.) During the

approximately 22 preceding months, Aldworth terminated 7 employees under the old SAP. (SA70;A1590-1700.) Seven of the 10 terminated employees would not have been discharged under the old SAP. They were Kenneth Mitchell, Jesse Sellers, Douglas King, Gary Allen, Pierson Bostic, Wade Rosenburger, and David Wolfer, each of whom would have received a suspension under the old system. (SA70;SA47-50,977-80,1703-07,1713-24,1728-36,1763-67,1784-89.)

Mitchell, King, Sellers, Robert Moss, and David Shipman worked in the freezer section of the warehouse. They worked together on the same shift and were the only freezer selectors on that shift. During the organizing campaign, each of them openly engaged in union activities. By October 13, Roy and Regional Operations Manager Kennedy knew that all the freezer employees were union supporters. (SA142;A187-89,213,229-32,233-34,283-85,287,312,326-28,329,337-38,572-73,SSA1-5.)

On October 13, the five completed their freezer shift early. Mitchell left the facility and Moss, Sellers, and King went to the adjoining "warm room" to relax. In the room was a box of small containers of orange juice, ripped open, with two small opened containers nearby. Aldworth and Dunkin′ officials, including Manager Shive, later questioned Mitchell, Moss, Sellers, and King, all of whom denied that they drank the juice or knew who did.[3] When Fisher questioned King,

[3] Shipman later admitted opening and drinking the juice. (SA143;A296,321.)

Fisher remarked that King spent a lot of time working on the union campaign and was a big union supporter. (SA142-44;A204-06,239-40,242-49,278-81,292-94,295,313-20,332-34,347-49,373-76,415,560,561.)

On October 20, Manager Kennedy reassigned Mitchell to the dry freight section of the warehouse on the shift beginning at 7 a.m. Kennedy explained that Mitchell had been "identified" regarding the "use of the unauthorized room off the freezer" by "all 4 individuals who were involved in this latest incident," and that there had been significant shortages indicating substandard performance by the freezer crew. (SA144;A207-210,SA51.)

On October 21, Moss, Sellers, Shipman, and King were each informed by letter that they had taken an unauthorized break in an unauthorized area," and "were also found in a room with product that that been stolen from inventory and partially consumed." The letter informed them that they would be suspended for 5 days and transferred to the dry freight section of the warehouse on the 7 a.m. shift. (SA145;A945,976.)

In late October or early November, Supervisor Henderschott told Moss that he was going to write him up for wearing a union T-shirt. (SA128;A233-34.)

On November 12, Aldworth gave Sellers a 1-day suspension for "insubordination and poor attitude toward supervision" for stating to a supervisor during a meeting, "[I]f I get caught stealing pens, do I get sent back to the

freezer?" (SA147;A300-02,944.) At a recent similar meeting, employee Aaron Lewis had called two supervisors "a couple of punks." He was not disciplined. (SA147;A306-07.)

On November 19, Aldworth discharged Moss for insubordination and foul language after he told Supervisor Keith Cybulski that a recent decision to deny him overtime was "pretty fucked up." The warehouse employees regularly use profanity, and without punishment, have told supervisors that assignments and policies were "fucked up," and have called supervisors "asshole" and "pussy" and threatened to beat their asses. (SA154-55;A150-211,250-56,308,371-72.)

In April 1999, Fisher asked employee Meduri if he had heard anything about the Union. (SA131;A131.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Liebman, Cowen and Bartlett) found, in agreement with the administrative law judge, that Aldworth and Dunkin′ are joint employers of the unit employees. (SA62,64-66,77,85-101,158.)

The Board further found (Member Bartlett dissenting in part), in agreement with the administrative law judge, that the Companies violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by soliciting employee grievances and promising to adjust them; promising employee benefits; threatening employees that they will start with nothing when bargaining with the Union begins; announcing and implementing the use of an "issue report" form; adjusting employee grievances; soliciting employees to report when they were being bothered or harassed by union activity; promising to adjust employee grievances and improve benefits; threatening employees with loss of jobs if they selected the Union; threatening to discipline or discharge employees if they supported the Union; threatening that it would be futile to select the Union; promising to create, and creating, a new operations manager position and promising to create a new dispatch supervisor position; inviting employees to bid on the newly created dispatch supervisor position; threatening employees with loss of their 401(k) plan if they select the Union; threatening a prounion employee with loss of his boot allowance; promising employees that they would no longer have to deal with an unpopular

supervisor; instructing employees to remove their union pins; threatening to discharge an employee for wearing a union pin; threatening employees with unspecified reprisals; threatening that the facility might close as a result of the employees' union activities; threatening to impose less favorable working conditions on employees if they engaged in union activity; coercively interrogating an employee about his union activity and promising to refrain from discharging an employee if he abandoned his support for the Union; and telling an employee that his suspension was a consequence of his union activity. (SA66-69,77,102-132,139-40,158.) The Board also found, reversing the administrative law judge, that the Companies violated Section 8(a)(1) of the Act by disparaging the employees for supporting the Union and thereby threatening employees that union activity would result in disciplinary actions. (SA62,66-67,77,107,108-09.)

The Board further found, in agreement with the administrative law judge, that the Companies violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Leo Leo and Robert Moss because they engaged in union activity; conducting an audit of the route of employee William McCorry and suspending him because he engaged in union activity; suspending employees King, Moss, and Sellers because they engaged in union activity; transferring employees Mitchell, King, Moss, and Sellers because they engaged in union activity; suspending employee Sellers because of his union activity;

implementing a new selection accuracy program in retaliation for warehouse employees' support for the Union; and discharging seven employees pursuant to that program. (SA62,69-72,77-78,132-56,158.)

The Board also found that *Aldworth* violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union while engaging in conduct that undermined the Union's support and prevented a fair rerun election, and by unilaterally implementing the new selection accuracy program and disciplining employees pursuant to that program. (SA62,66,70n.41,72n.48,72-73,78,157,158.)

The Board's separate remedial orders issued to Aldworth and Dunkin′ require the Companies to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (SA62,66n.23,78.)

Affirmatively, the Board's Orders require the Companies to offer reinstatement to those employees unlawfully discharged; to make whole, jointly and severally, those employees who suffered losses as a result of the discrimination against them; to rescind the selection accuracy program implemented in October 1998 and restore the program that previously existed; to remove from the files of affected employees any references to the unlawful discharges, suspensions, and

other disciplinary actions taken against them; and to post copies of remedial notices. (SA78-80.) Finally, the Order issued to Aldworth requires it to bargain with the Union on request. (SA62,66,79.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that Aldworth and Dunkin′ are joint employers of Aldworth's unit employees. Dunkin′ exercises meaningful control over the Aldworth employees' terms and conditions of employment.

Substantial evidence supports the Board's finding that the Companies violated Section 8(a)(1) of the Act by numerous coercive acts, including solicitations, promises, and threats, and violated Section 8(a)(3) and (1) of the Act by discriminatorily auditing, suspending and transferring union supporters, and by implementing a new selection accuracy program.

The Board reasonably exercised its discretion in ordering Aldworth to bargain with the Union and properly found that Aldworth violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by making unilateral changes in working conditions.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ALDWORTH AND DUNKIN′ ARE JOINT EMPLOYERS OF THE UNIT EMPLOYEES

A. Applicable Principles and Standard of Review

Two separate entities are joint employers if they "exert significant control over the same employees" and "share or codetermine those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123, 1124 (3d Cir. 1982), and cases cited. *See also ICWU Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977) (joint employer status depends upon the amount of actual and potential control one employer exercises over employment conditions of another employer).

Among the indicia that the Board and courts have found to demonstrate joint employer status are meaningful control over or participation in hiring and firing[4],

[4] *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432, 1433 (5th Cir. 1991); *NLRB v. Browning-Ferris Industries*, 691 F.2d at 1124; *Mingo Logan Coal Co*., 336 NLRB No. 5, 2001 WL 1176593 *26 (2001), *enforced* 67 Fed. Appx. 178 (4th Cir. 2003).

wage and benefit determination, [5] assignment and direction of work,[6] and employee discipline.[7]

The Board's determination that "sufficient indicia of control" exist to create joint employer status is "essentially a factual issue." *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964). Therefore, the Board's finding of joint employer status should be sustained if supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 348 U.S. 474, 487-88 (1951). *Texas World Service Co. v. NLRB*, 928 F.2d at 1431. Judicial review of the Board's credibility determinations is particularly circumscribed. Such determinations must be sustained by the reviewing court unless they are "hopelessly incredible or self-contradictory." *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988).

B. The Record Supports a Finding of Joint Employer Status

Here, all the established indicia of joint employer status are present. Dunkin′ played a significant role in the hiring and firing of the Aldworth drivers and warehouse employees. As shown, Dunkin′ Transportation Manager Knoble

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[5] *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1267 (7th Cir. 1987); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985).
[6] *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993); *W.W. Grainger v. NLRB*, 860 F.2d 244, 247 (7th Cir. 1988).
[7] *NLRB v. Solid Waste Services, Inc*., 38 F.3d 93, 94 (2d Cir. 1994); *G. Heisleman Brewing Company, Inc. v. NLRB*, 879 F.2d 1526, 1531 (7th Cir. 1989).

received and sometimes administered driver applicant road tests, interviewed driver applicants, and prevented the hiring of applicants he did not approve. Knoble and Shive participated in the hiring of Hoffman as an Aldworth supervisor. Dunkin′ Warehouse Supervisor Engard tested warehouse applicants and reported his opinion on their qualifications, which Aldworth only occasionally failed to follow. Dunkin′ could request that an employee be terminated for good cause, was consulted on termination decisions, and was always either aware of or involved in such decisions. *See NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1266 (7th Cir. 1987) (influence over hiring evidence of joint employer status); *Texas World Services Co. v. NLRB*, 928 F.2d 1426, 1433, 1434 (influence over hiring and firing decisions).

Dunkin′ played a determinative role in Aldworth employees' wages and benefits, caused the discontinuation of an employee bonus program, and established, in significant part, the performance standards for Aldworth driver incentive awards. *See Quantun Resources Corp*., 305 NLRB 759, 760 (1991) (control over wage and benefit rates evidence of joint employer status.)

Dunkin′ had virtually total control over the work assignments of the Aldworth drivers. Knoble made all driver assignments to vehicles, shifts, and routes. He also determined employee time off. Engard scheduled the work of the warehouse employees, and the suspension days for one employee.

Dunkin′ had similarly overwhelming control over the day-to-day direction of the Aldworth drivers' work, with Knoble instructing and directing the drivers, and reviewing their performance. *See Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (day-to-day control over driver working conditions evidence of joint employer status.)

Dunkin′ also played a significant role in the discipline of Aldworth employees, with involvement in about 25 percent of the disciplinary actions and all disciplinary action of a "delicate" or serious nature. Knoble frequently filed incident reports that resulted in disciplinary action, and Engard also reported incidents leading to discipline. Knoble conducted accident investigations and helped determine whether the accident was preventable. Knoble also played a more direct role in other cases, suspending and warning employees directly and instructing Hoffman on the discipline of employees, while Manager Shive gave a warning to one employee and sent him home. *See Mingo Logan Coal Co*., 336 NLRB No. 5, 2001 WL 1176593, *25-26 (2001), *enfd*., 67 Fed. Appx. 178 (4th Cir. 2003) (effective recommendation of discipline evidence of joint employer status).

Finally, as the Board pointed out (SA65), Dunkin′ played a significant role in events alleged as unfair labor practices. Thus, as shown, Manager Shive

conducted an unlawful audit of employee McCorry and played a leading role in the unlawful discipline of the freezer employees.

C. Dunkin′s Contentions are Without Merit

Dunkin′s initial contention (Br 4-6)--that the Union's naming of Aldworth alone as the employer in the representation petition, election stipulation, and initial unfair labor practice charges constitutes a waiver of its subsequent contention that Dunkin′ was a joint employer--is without merit. Its reliance on *Goodyear Tire and Rubber Co*., 312 NLRB 674, 688, 689 (1993) ("*Goodyear*"), is misplaced.

In *Goodyear*, the union, after winning the election, being certified by the Board, and enjoying a bargaining relationship with the employer, became interested in other employers, such a Goodyear, only when the original named employer was about to lose its service contract. 312 NLRB at 688. Thus, the union "made a deliberate decision, comparable to a waiver, that the only employer with whom it intended to bargain was [Goodyear's lessor]," and could not substitute Goodyear as the "employer" with a bargaining obligation. *Id*. at 688-89. No such facts are present here.

As the Board noted (SA64), as in *Goodyear,* the Union's earlier naming of Aldworth alone affects only the bargaining rights and obligations of the parties. The Board specifically protected Dunkin′ from an unwarranted bargaining obligation by issuing separate remedial orders requiring *only Aldworth* to bargain

with the Union. Thus, the Board accurately noted that Dunkin′s due process rights were not harmed in any way and properly considered its unlawful conduct as a joint employer based on numerous unfair labor practice charges filed by the Union that *did* name Dunkin′ as a respondent.[8]

With respect to the hiring of drivers, there is no merit to Dunkin′s credibility-based challenge (Br 8-9) to the testimony regarding Knoble's role (SA99). Moreover, Dunkin′s challenges (Br 10-11) to its role in employee terminations ignore Operations Manager Fisher's admission that he consulted with Dunkin′s managers concerning terminations and that Dunkin was either "involved in" or "aware of" such matters.

Dunkin′s challenges to the Board's findings regarding its direct role in discipline are unpersuasive. For example, although the formal issuance of the suspension was by Aldworth, Knoble made the *decision* to suspend employee Puig.[9] Knoble also directly decided the action to be taken in response to motorists'

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[8] Dunkin′ s reliance on *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1184-87 (7th Cir. 1993), and *Alaska Roughnecks & Drillers Assn. v. NLRB*, 555 F.2d 732, 735 (9th Cir. 1977), is equally misplaced. The issue in both cases, as in *Goodyear*, involved the *bargaining obligation* of an asserted joint employer, an issue not presented here.

[9] In *Clinton's Ditch Cooperative Co., Inc. v. NLRB*, 778 F.2d 132, 135-39 (2d Cir. 1985 ("*Clinton's Ditch"*); *Local 773*, *IBT v. Cotter & Co*., 691 F. Supp. 875, 877-82 (E.D. Pa. 1988) ("*Local 773*"); *Goodyear*, and *Osco Drug Co., Inc*., 294 NLRB 799, 781-85, 785-88 (1989) ("*Osco"*), cited by Dunkin′ (Br 22), there is no such example of discipline, as opposed to *reporting* of incidents, by the lessee.

complaints.[10] And through participation in "incident reports," Dunkin′ increased the role it played "in monitoring and supervising the daily work activities of the Aldworth employees."[11] (SA100).

Contrary to Dunkin's suggestion (Br14-15), its level of participation in determining whether a vehicular accident had been "preventable" was not limited to attendance and participation in a joint review board. As the administrative law judge noted (SA92n.27), Knoble alone *investigated* the accidents and had the knowledge to influence the board's determination.[12]

Dunkin's reliance (Br15-16) on *Goodyear* in support of its "compensation" argument is misplaced and was properly rejected by the administrative law judge

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[10] Dunkin′s claim (Br 20) that Fisher and Knoble would make a joint decision in such cases does not negate Knoble's substantial participation in the process.

[11] As the judge noted, the monitoring of employee conduct by Dunkin′ showed a more extensive level of monitoring than that found in *TLI*, *Inc*., 271 NLRB 798, 798-99 (1984) ("TLI"); *Clinton's Ditch*, 778 F.2d at 138; and *Osco*, 294 NLRB at 782. (SA95-96,100.)

[12] Dunkin′s reliance (Br14-15) on *Local 776, IBT* (*Pennsy Supply, Inc*.), 313 NLRB, 1148, 1159 (1994) ("*Pennsy*"), and *TLI*, 271 NLRB at 798-99, is misplaced and was properly rejected by the judge. (SA100.) In *Pennsy*, there is no evidence that the lessee (the equivalent of Dunkin' here) investigated the accident, and the lessor and lessee in *Pennsy* would have the final say in cases involving their respective employees. 313 NLRB at 1159-60. In *TLI*, the lessor (the equivalent of Aldworth) investigated accidents and determined whether they had been preventable. 271 NLRB at 799.

(SA100). The lessor in *Goodyear* provided additional benefits beyond those specified in the cost-plus arrangement. 312 NLRB at 678. Moreover, Dunkin's financial arrangement with Aldworth went beyond an arm's-length agreement, with Dunkin′ deciding that Aldworth's bonus program was ineffective and killing it by declining to endorse it. (SA86,99.)

Dunkin′s reliance (Br19-20) on *Pennsy, Local 773*, *TLI*, and *Clinton's Ditch* in support of its "assignments" argument is also without merit. Those cases, for the most part, involved simple distribution of routes, a practice far less extensive than Dunkin′s here. *See Pennsy*, 313 NLRB at 1163*; Local 773*, 691 F. Supp. at 878; *TLI*, 271 NLRB at 799; *Clinton's Ditch*, 778 F.2d at 139; *Goodyear*, 312 NLRB at 690.

There is also no merit to Dunkin′s contention (Br21) that its direction of the interaction between its retail shops and Aldworth drivers does not indicate joint employment. As the administrative law judge noted (SA97-98,100-01) and as shown above, Knoble did more than "merely prepare a response to complaints."[13]

Finally, the cases selected by Dunkin′ (Br22-24) as having "facts nearly identical to those here" are distinguishable in other respects. In *International*

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[13] The cases relied on by Dunkin′ are inapposite. In *Local 773*, the lessee simply transmitted customer complaints. 691 F. Supp. at 881. In *Clinton's Ditch*, the lessee forwarded complaints to the lessor and there was no evidence of the kind of active role played by Knoble here.

Chem. Wkrs. U. Loc. 483 v. NLRB, 561 F.2d 253, 255-57 (D.C. Cir. 1977), the relationship was simply a temporary contract for the duration of a strike, the wage scale was set by the lessor based on its union contract rates with other lessees, and the lessee exercised no control over hiring or direction of work. In *Clinton's Ditch*, the lessee had no role in hiring or firing, no direct role in discipline, and a far less determinative role in setting employee pay. 778 F.2d at 139-135, 138-140. In *Local 773*, the lessee had no role in hiring, a limited role in discipline, no input into whether an accident had been preventable, and no power over the lessor's collective-bargaining negotiations with its employees' union, wherein pay rates and other employment terms and conditions were set. 691 F. Supp. at 877-78, 881-83. In *Pennsy*, the lessor had total control over hiring, firing, discipline, and the collective-bargaining negotiations that determined its employees' terms and conditions of employment. 313 NLRB at 1158, 1162-64. In *Goodyear*, the lessor had sole control over employee health insurance and retirement benefits, and the lessee had no participation in the disciplinary decision-making process, almost nonexistent participation in daily supervision, and no participation in the lessee's collective-bargaining negotiations with its union. 312 NLRB at 678, 680-84, 686, 688, 689-90. In *Osco*, the lessee had no involvement in hiring, firing or discipline and did not own the lessee's vehicles, while compensation, vacations, and holidays were governed by the contract between the lesser and its union. 294 NLRB at 781,

782, 786-88. In *TLI*, the drivers selected their own assignments based on seniority, the lessor alone investigated accidents to determine if they were preventable and determined the action to be taken, and the lessor alone negotiated with its union the economic matters that governed crucial employment terms. 271 NLRB at 799.

II. THE COMPANIES ARE PRECLUDED FROM CHALLENGING SEVERAL OF THE BOARD'S FINDINGS THAT THEY VIOLATED SECTION 8(a)(1) OF THE ACT BY NUMEROUS THREATS, PROMISES, AND OTHER COERCIVE ACTS IN RESPONSE TO THE UNION'S ORGANIZING CAMPAIGN AND SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS CONCERNING THE REMAINING SECTION 8(a)(1) VIOLATIONS

A. Applicable Principles and Standard of Review

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Company v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *Avecor, Inc. v. NLRB*, 931 F.2d at 931; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

This Court has recognized "the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee

relationship." *Avecor, Inc. v. NLRB*, 931 F.2d at 931, citing *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 143 (D.C. Cir. 1989) (quoting *NLRB v. Gissel Packing Co*., 395 U.S. 575, 620 (1969) ("*Gissel*").

A Board finding that an employer has engaged in coercive conduct must be sustained if supported by substantial evidence on the record as a whole, even though the reviewing court might have reached a different conclusion had the matter been before it de novo. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 306 (D.C. Cir. 2003).

B. The Findings that are not Before the Court or are Entitled to Summary Enforcement

As the Board noted (SA62n.4), the Companies filed no exceptions to several Section 8(a)(1) violations found by the administrative law judge. Accordingly, the Companies are barred from challenging the Board's findings that they violated the Act by Supervisor Mann's mid-August threat to employee Mitchell of job loss in the event of unionization; by repeated discriminatory prohibitions of employees' wearing union T-shirts and pins and the statement that employee Meduri's wearing of a union pin would cause him to lose his job; by supervisors threatening employee Williams that employees would suffer job loss and unspecified reprisals if they selected union representation; by Supervisor Mann's threat to freezer employees of less favorable and less flexible working conditions if they selected union representation; and by Operations Manager Fisher's interrogating employee

Meduri and telling employee King that his support for the Union could make him ineligible for the Company boot allowance. See Section 10(e) of the Act (29 U.S.C. § 160(e))[14]; *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (court of appeals lacks jurisdiction to consider issues not properly raised before Board); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2002) (same). Accordingly, the Board will not answer Aldworth's challenges (Br 15-17) to these findings.

Additionally, Aldworth's brief fails to contest one of those findings -- Mann's mid-August threat to Mitchell. Accordingly, that finding is also entitled to summary affirmance by the Court based on the Companies' waiver. *See Intern. U. of Petro and Indus. Wkrs. v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992).

C. Threats

An employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening that unionization will lead to consequences such as plant closure,[15] loss of jobs,[16] loss of benefits through the employer's initiation of bargaining from

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[14] Section 10(e) provides in relevant part: "No objection that has not been urged before the Board . . . shall be considered by the court," absent extraordinary circumstances. The Company has not alleged any extraordinary circumstances.
[15] *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 952 (D.C. Cir. 1988), and cases cited; *Poly America, Inc. v. NLRB*, 260 F.3d 465, 484 (5th Cir. 2001).
[16] *Amalgamated Clothing Wkrs. v. NLRB*, 420 F.2d 1296, 1299 (D.C. Cir. 1969); *Tellepsen Pipeline Services Co. v. NLRB*, 320 F.3d 554, 561-62 (5th Cir. 2003).

"nothing"[17] or taking away specific benefits,[18] or imposition of less favorable working conditions,[19] that unionization will be futile,[20] and that they or other employees have been discharged or disciplined because of their union activity.[21] Here, the record fully supports the Board's finding that the Companies made numerous such unlawful threats and predictions.

The Companies repeatedly predicted that unionization would lead to closure of the facility as far as their jobs were concerned. As shown, Roy repeatedly told the employees that unionization could cause Aldworth to lose its Dunkin′ contract and cause them to lose their jobs. As the Board noted (SA67-69 and n.30), contract cancellation here is "tantamount to a plant closing" and job loss for the Aldworth employees.

Moreover, Roy's repeated raising of the subject took place amidst numerous other unlawfully coercive promises and threats that the Board properly found independently violative of Section 8(a)(1). Those violations include Dunkin′

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[17] *Chauffeurs, Teamsters & Helpers, Local 633 v. NLRB*, 509 F.2d 490, 496 (D.C. Cir. 1974); *NLRB v. General Fabrications Corp*., 222 F.3d 218, 231 (6th Cir. 2000).

[18] *Southwest Regional Joint Bd. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970); *V&S Progalv v. NLRB*, 168 F.3d 270, 279 (6th Cir. 1999).

[19] *NLRB v. General Fabrications, Inc*., 223 F.3d 218, 231 (6th Cir. 2000); *Overnite Transp. v. NLRB*, 280 F.3d 417, 457 (4th Cir. 2002).

[20] *Overnite Transp. Co. v. NLRB*, 280 F.3d at 430; *Douglas Foods Corp. v. NLRB*, 251 F.3d 1060, 1061-62 (D.C. Cir. 2001).

[21] *NLRB v. Mars Sales & Equipment Co*., 626 F.2d 567, 571-72 (7th Cir. 1980); *Aero Metal Forms*, 310 NLRB 397, 399-400 (1991).

Supervisor Engard's statement to not "let the door be locked" after the election and Aldworth supervisors' statements that Dunkin′ was ready to bring in people to take over the operation of the facility if there was a loss of contract or a strike. They also include Roy's repeated threats that bargaining would begin with a blank sheet of paper and that the employees would lose their 401(k) plan. They further include Manager Fisher's threat that unionization might prevent Aldworth from granting requests for days off, Supervisor Donohue's statement that the employees were going to screw themselves if the Union got in, and Roy's repeated threats that the Union could not do "a god-damn thing" for them "unless I say so," that no one could force change on him without his agreement, that no "outside" person was going to help him make things better, and that he was not going to learn from union representatives. Finally, they include Roy's threats of discharge or discipline by warning employees not to "grab on to" union supporters Leo and McCorry, who, as we show below, were subsequently discharged and suspended, respectively, on false or pretextual grounds.[22]

[22] The record also supports the Board's finding (SA67) that Roy's remarks were unlawful on the additional ground that they held Leo and McCorry up to derision before all other employees by publicly and falsely accusing them of specific and serious misconduct.

D. Solicitations, promises, and improvements

An employer also violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promising or granting benefits to employees to influence their union activities or vote. *General Electric Co. v. NLRB*, 117 F.3d 627, 636-37 (D.C. Cir. 1997). Thus, an employer violates the Act by soliciting employee grievances and promising, implicitly or explicitly, to adjust them in order to discourage support for a union. *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 102-03 (D.C. Cir. 2000). Here, the record fully supports the Board's findings that the Companies repeatedly solicited employee grievances and promised to adjust them in a series of mandatory meetings, and delivered on some of those promises.

During the course of these meetings, inspired by the acknowledged "wake-up call" of the Union's organizing campaign, Aldworth Vice President Roy expanded on earlier solicitations by announcing a new "issue report form" to formally solicit grievances. At various meetings, Aldworth President Dunn also urged the employees to express their grievances and Roy urged the employees to "come forward" with grievances and talk to him and other officials about them, asked them to tell him what caused the union organizing effort and what their "major issues" were, and urged them again to "come forward" and not be shy. New Manager Kennedy also invited their questions.

Aldworth combined these solicitations with promises to remedy the grievances. President Dunn promised the employees he would "work on" their problems. Roy made broad promises that he would resolve their issues, that he could "make things happen," that they should "see something" regarding changes before the election, and that things were going to "change" and "be nice." He made specific promises to look into wage and benefit increases, to hire a new regional manager to handle their requests and create a new supervisor position they could apply for, to relieve them from Knoble's route time requirements, to restructure the bidding process, to resolve other complaints about Knoble, and to address problems with the health plan. Aldworth also reinforced the unlawfulness of these promises by delivering on several of them: implementing use of the issue report form, announcing that Knoble's route time requirements no longer applied, hiring Kennedy as the promised regional manager, stating that "reinforcements" were on the way, taking Knoble "out of the picture," and announcing that it had resolved an employee's medical coverage grievance.

Finally, Roy's June 16 memo urging the employees to report if they were harassed or "bothered" by union supporters was, as the administrative law judge found (SA107), an unlawful request to report on the union activities of fellow employees. *See Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998).

There is no merit to Aldworth's contention (Br8-9,10-11,14) that its solicitations of employee grievances, promises to adjust them, and implementation of improvements were simply a continuation of its past practice of seeking, discussing, and resolving issues raised at regularly held meetings with employees. Roy's seven preelection meetings featured solicitations, promises, and announcements of improvements in combination with antiunion threats and other coercive statements in acknowledged response to the Union's "wake-up" call.

There is also no merit to Aldworth's claim (Br9,13-15) that its announcement and creation of the new regional operations manager and dispatch supervisor positions were lawful because it had made the decision to take those actions before the organizing campaign began. Rather, it hired Kennedy just a few days before the election and it promised both positions at the same time it made other promises of improvements.[23]

There is no merit to Aldworth's contentions that certain threats were simply objective statements about the consequence of unionization permissible under *Gissell*. 395 U.S. at 618. Those statements do not meet the *Gissel* requirement that they be carefully phrased, based on objective facts, state a probable

[23] Aldworth's claim (Br 9) that it had long advertised the new operations manager position in unavailing. Those advertisements were not for an operations manager. (SA105;A1801-02.)

consequences beyond the employer's control, and not contain a threat of reprisal. *Id*.

Thus, contrary to Aldworth's claims (Br 9-10, 12-14, 16-17), as the administrative law judge and the Board noted, Roy's "blank sheet of paper" statement went beyond explaining that Aldworth could propose less benefits, and threatened to withdraw current benefits at the beginning of any negotiations, with no accompanying disclaimers. (SA108,112,118). The threats of plant closure and job loss were not limited to "possibilities related to the bargaining process", but painted a worst-case scenario connecting unionization with job loss (SA68-69). The threats that unionization would be futile went beyond explanation or opinion. Roy's statement that the Union could not do a "god-damn thing" without him and could not bring improvements, and that he would not learn from the Union, were not balanced by further explanation that would remove their tendency to coerce (SA113,114). The "loss of 401(k)" threats were not phrased as a consequence of good-faith bargaining, but an "automatic result of unionization," as conveyed by Roy's use of such phrases as "your 401(k)'s gone" and "forget a 401(k)" (SA122,124,126). Manager Fisher's threat regarding days off and Supervisor Mann's threat of loss of favorable worktime and workplace conditions were made in the absence of any reference to, or context of, "probable consequences beyond Aldworth's control." (SA130-31.)

There is also no merit to Aldworth's attempt (Br11,12-13,17-18) to paint other statements as nonunion-related or otherwise justified or noncoercive. Contrary to Aldworth's contention, Roy's June 27 statement identified Leo and McCorry by highlighting their subsequently imposed discipline and, within a context of other antiunion statements, warned employees against "grabbing onto" the two well known union activists. (SA66-67.) Roy's statement to McCorry that he would be suspended rather than discharged was coupled with the requirement that McCorry tell the employees that his suspension was for nonunion-related reasons and resulted in McCorry's abandonment of union activities. (SA139-40.) Kennedy's statement to King that King was a big union supporter who spent a lot of time on the campaign was made in the course of an investigation that resulted in the suspension of King that was, contrary to Aldworth, unlawful. See discussion below. Aldworth's "harassment" memo soliciting information about union activities was not shown to be warranted by any unlawful, or even improper, conduct by the Union. (SA106-07.)

Finally, there is no merit to Aldworth's contentions (Br15-16) that Donahue's statement--that the employees would "screw" themselves if they chose the Union--was "vague" and that Engard's warning about not letting the doors be locked was a noncoercive "joke." Donahue's statement was explicit; Engard's warning was made to an unlawfully suspended former union supporter shortly

before his vote in the election; and both were made within a context of other unlawful statements.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING, AUDITING, SUSPENDING AND TRANSFERRING EMPLOYEES BECAUSE THEY ENGAGED IN UNION ACTIVITY

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse employment actions against employees for engaging in union activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 397-398 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2000).

The legality of an employer's adverse actions depends on its motivation. If substantial evidence supports the Board's finding that unlawful considerations were a motivating factor in the discipline or discharge, the employer's action is unlawful, unless the record compels the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of union activity. *NLRB v. Transportation Management Corp*., 462 U.S. at 300-03 ;

Traction Wholesale Ctr. Co. v. NLRB, 216 F.2d 92, 99 (D.C. Cir. 2000). Where the employer's proffered reason is shown to be a mere pretext, the employer has failed to meet its burden. *Limestone Apparel Corp*., 255 NLRB 722 (1981), *enforced* 705 F.2d 799, 800 (6th Cir. 1982).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003), and cases cited. Such evidence includes knowledge of union activities,[24] hostility toward union activities as revealed by the commission of other unfair labor practices,[25] and the timing of the adverse action.[26] Unlawful motivation can also be demonstrated by the employer's according disparate treatment to employees based on their union activities[27] and giving implausible or shifting reasons for the actions taken against them.[28]

Here, the record fully supports the Board's findings that antiunion considerations were a motivating factor in the Companies' actions and that the

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[24] *Tasty Baking Co. v. NLRB*, 254 F.3d at 125.
[25] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994)
[26] *Tasty Baking Co.,* 254 F.3d at 126; *Davis Supermarkets,*, 2 F.3d 1162, 1168 (D.C. Cir. 1993).
[27] *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993).
[28] *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *Davis Supermarkets*, 2 F.3d at 1167-68, 1170.

Companies failed to demonstrate that they would have taken those actions in the absence of such considerations.

B. The Companies Audited, Suspended, Discharged and Transferred Employees Because of their Union Activities

1. The Discharge of Leo and the Audit and Suspension of McCorry

The Companies retaliated against union supporters Leo Leo and William McCorry and used them as examples to other employees of the consequences of union support.

a. Leo

Leo was an open union activist who revealed his prounion views to Operations Manager Fisher. Indeed, the Companies do not contest that they knew of his activities. Aldworth's antiunion animus is repeatedly demonstrated by the numerous unlawful statements and actions discussed above and the timing of the discharge in the midst of the organizing campaign. Moreover, Vice President Roy expressly revealed his hostility toward Leo's union activity at the June 27 meeting, where, in discussing the Union, he warned employees not to "grab onto" Leo, who had "one foot out of the door." As the administrative law judge observed (SA134), this "directly linked Leo's termination with his union activity." Moreover, Roy later told McCorry that Leo's termination was what happens when employees

"fight these things," a reference to Leo's continued union activity and a virtual admission of unlawful motivation.

Aldworth discharged Leo on the asserted ground that he had a "continuing pattern of attendance related failures" based on an excessive number of "lates" and "callouts." The record shows, however, that a number of other employees--Wade, Cropper, Mingin, Pinkney, and Blevins--had similarly serious records of attendance problems and were not discharged. (SA133-34;A1343-1489.) As the administrative law judge noted (SA135-36), "Aldworth disparately applied its attendance and tardiness rules against Leo," choosing not to discharge "other employees [who] had records as bad as, or worse than, Leo's record." Such disparate treatment supports the finding that Leo's attendance record was a pretext. Nor does Aldworth's contention that Leo's record was "unique" satisfy its burden of showing that it *would* have, not just *could* have, discharged him for nonunion reasons. *See Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1553 (10th Cir. 1996).

b. McCorry

McCorry was a union activist who, along with Leo, was identified as a target of Aldworth's antiunion hostility.[29] Moreover, his suspension was closely followed by Roy's statements to him that Leo had been discharged because he chose to "fight these things" by supporting the Union, that McCorry should abandon his union activity and tell fellow employees that he deserved his suspension for nonunion-related reasons, that he was upset by the sight of union buttons, and that Aldworth did not need a union.

The reasons asserted by Dunkin' in support of McCorry's audit and suspension (Br25-27) were properly rejected by the administrative law judge. (SA139-41.) Aldworth claimed that McCorry was the subject of a lawful audit or survey during which he was followed on his route and observed engaging in conduct that warranted his suspension for deliberately falsifying his delivery manifest and driver logs (SA136-41.) As the judge noted, however, the evidence fails to show that the audit would have taken place absent McCorry's union activity. The audit was personally conducted, on his own initiative, by Dunkin′

[29] Dunkin′s reliance (Br 26) on the absence of a finding that it had knowledge of McCorry's union activity is misplaced. As the administrative law judge observed (SA140), Dunkin′ played a direct role in Aldworth employee activities and in the investigation of McCorry, and is a joint employer.

Manager Shive, who was the highest-ranking Dunkin′ official at the facility and who had never before done such an audit because he was "too busy." (SA137;A427.) Moreover, Shive's testimony, that he discovered paperwork irregularities that prompted the audit and observed improper conduct by McCorry, such as sleeping during the route, was reasonably discredited by the judge. (SA136-38,140). Thus, the judge was warranted in finding that the audit was unlawfully conducted and furnished no lawful basis for the suspension.

In light of the unlawfulness of the audit, McCorry's suspension based upon it was also unlawful (A140). *See, for example, Performance Friction Corp. v. NLRB*, 117 F.3d 763, 766-67 (4th Cir. 1997). As the judge noted, McCorry simply failed to complete his manifest, an act that does not constitute deliberate falsification and had been done by McCorry previously without discipline. (SA140;A41,49-53,534-35.). Moreover, other employees have even committed falsifications without discipline. (SA140;138-39.)

2. The Suspension and Transfers of the Warehouse Freezer Employees

The Companies also retaliated against four prounion warehouse freezer employees by imposing a 5-day suspension and a transfer to a less desirable shift on King, Moss, and Sellers, and a similar transfer on Mitchell.

These employees all openly engaged in union activities and the Companies showed animus individually against them. Various officials or supervisors of the

Companies threatened Mitchell with job loss in the event of unionization, threatened Sellers and Mitchell with less favorable working conditions, threatened to withhold King's boot allowance, and instructed Moss to remove his union T-shirt. Moreover, Fisher admitted unlawful motivation by reminding King, upon informing him of his suspension, that he, King, had spent a lot of time on the organizing campaign and was a big union supporter.[30]

The Companies also failed to demonstrate a lawful basis for the suspensions and transfers. The asserted ground for those actions was the October 13 "orange juice incident." The Companies alleged that King, Moss, and Sellers had been on an unauthorized break in an unauthorized area containing stolen and partially consumed juice. They also alleged that Mitchell, who was not even at the facility during the orange juice incident, had been "identified" regarding the use of the "unauthorized room" and linked to shortages indicating substandard performance by the freezer crew.

As the administrative law judge noted (SA146), none of these asserted grounds has merit. The break was not "unauthorized" and the room was not an "unauthorized" area. Aldworth supervisors had condoned the freezer employees' post-shift breaks and use of the "warm room" by freezer employees and others.

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[30] As the administrative law judge properly found (SA145), that remark also violated Section 8(a)(1) of the Act because it amounted to telling King that he was suspended because of his union activities.

(SA146;A200-01,206-07,235-41,279,285-86,292-93,323,330-31,340-42,344-46,361-62,376-77.) The "presence in a room with stolen product" assertion is unsupported by evidence that Aldworth would discipline employees for that reason, particularly where, as here, they did not drink the juice and did not even see Shipman drink it. With respect to Mitchell, the administrative law judge accurately observed (SA147), and the Companies do not dispute, that there is no evidence connecting him with the warm room events or any "shortages."

Dunkin′ challenges (Br28-29) the judge's crediting of testimony supporting those findings. Dunkin′ has failed to show, however, that those credibility determinations, based on witness demeanor and inherent probabilities (SA141-45), are "hopelessly incredible or self-contradictory." *See Teamsters Local 171 v. NLRB*, 863 F.2d at 953.

3. The 1-day suspension of Sellers and the discharge of Moss

Following their unlawful transfer of prounion employees Sellers and Moss, the Companies again retaliated against them by suspending Sellers for 1 day on November 11 and by terminating Moss on November 19. The Companies' explanations are not convincing. Sellers was allegedly suspended for "insubordination and poor attitude toward supervision" because he asked facetiously at a meeting if he could get transferred back to the freezer room by stealing a pen. Other employees, however, made directly insulting and

disrespectful remarks about supervisors at a contemporaneous similar meeting without discipline. Moss was allegedly discharged for insubordination and using foul language, after telling a supervisor that a decision the supervisor had made was "pretty fucked up". However, the Companies left unpunished numerous instances of language by other employees that was far more insubordinate and profane.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY IMPLEMENTING A NEW SELECTION ACCURACY PROGRAM AND BY DISCHARGING SEVEN PROUNION EMPLOYEES PURSUANT TO THAT PROGRAM

A. Applicable Principles

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by implementing more onerous performance or disciplinary standards for the purpose of discriminating against union supporters. *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 267-68 (D.C. Cir. 1993), and cases cited; *Performance Friction Corp. v. NLRB*, 117 F.3d at 766-67. An employer also violates Section 8(a)(3) and (1) by discharging employees pursuant to such standards. *Performance Friction Corp*., 117 F.3d at 766; *Huck Store Fixture Co*., 334 NLRB 116, 121-22 (2002), *enforced* 327 F.3d 528, 532-36 (7th Cir. 2003). *See also Frazier Indust. Co. v. NLRB*, 213 F.3d 750, 758-59 (D.C. Cir. 2000).

B. The Instant Case

Aldworth's new SAP enabled it to shorten the time required to discharge its warehouse employees, and it used the system to drastically increase the number of those discharges from 7 during an earlier 22-month period to 10 during a 4-month period. As the Board observed (SA70), these facts "starkly demonstrate the negative impact of the new SAP" and support the Board's finding (*id*.) that Aldworth "implemented the new system in reaction to employees' support for the Union." As the Board noted (SA70) and as shown above, Aldworth's antiunion animus is established by its numerous other unfair labor practices and its awareness that union support was high among warehouse employees.

C. Aldworth's Contentions are Without Merit

There is no merit to Aldworth's claim (Br21) that the new SAP was in some ways more "lenient" than the old SAP. As the Board noted (SA69-70 and n.40), while some aspects of the new SAP could produce a more lenient effect, the overall impact was quite the opposite.[31]

There is also no merit to Aldworth's reliance on the fact (Br21-23) that seven employees were not discharged until a date when they would have been discharged even under the old SAP. When employee Wolfer realized he was going

[31] The new SAP's purportedly more employee-friendly provisions, such as the substitution of training for suspension, were not shown to be effective in practice, as opposed to in theory.

to be discharged for accumulating too many points under the new SAP, without going through the requisite levels of discipline to have been terminated under the old SAP, he resigned. (SA153-54;A407-08,1764,1767.) Similar facts apply to employees Mitchell, Sellers, King, Bostic, Allen, and Rosenberger, all of whom were discharged for accumulating six points under the new SAP. (SA150-53;SA47-50,944,977-80,1703-07,1713-24,1728-36,SSA6-7.) The basis for Aldworth's contention is that the discharge of those employees did not take place immediately upon their accumulating the 6 points, but was delayed for a period during which they accumulated enough additional points to have been discharged under the old SAP. However, as the administrative law judge observed in rejecting that contention (SA153), employees were certainly aware that they were subject to discharge, although they were permitted to continue working for a while, and Aldworth itself did not rely on the points accumulated during the subsequent weeks.

V. THE BOARD REASONABLY EXERCISED ITS BROAD DISCRETION IN ORDERING ALDWORTH TO BARGAIN WITH THE UNION AS A REMEDY FOR ITS UNFAIR LABOR PRACTICES

A. Applicables Principles and Standard of Review

Collective-bargaining relationships may lawfully be based on a voluntary count of signed union authorization cards. *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297-98 (D.C. Cir. 1988). Consistent with those principles, the

Supreme Court in *Gissel,* 395 U.S. at 610, 613-14, affirmed the Board's authority to issue a remedial bargaining order, not only in "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," but also in cases where an employer has committed violations that "have the tendency to undermine majority strength and impede the election processes." In the latter situation, a bargaining order is proper "[i]f the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies . . . is slight and that employee sentiment once expressed through [union] cards would, on balance, be better protected by a bargaining order . . . ." *Id*. at 614-15. *Accord Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 821 (D.C. Cir. 2001).

This Court recently summarized the kind of "serious" employer misconduct that supports a *Gissel* bargaining order: unfair labor practices that are "deliberate" or "calculated," that threaten "a significant economic interest, such as retention of jobs . . .," that are "acts of reprisal, particularly discharge," that are "[p]romises to correct the grievance that led to union organization," and "most significantly . . . involve a series of unfair labor practices rather than a single act of illegality." *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 106 (D.C. Cir. 2000) ("*Traction*") (quoting *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996) ("*Skyline*")) (citations omitted).

"[I]t is for the Board and not the courts" to determine whether a bargaining order is appropriate, and the Board's "choice must . . . be given special respect by reviewing courts." *Gissel,* 395 U.S. at 612 n.32. *Accord Traction*, 216 F.3d at 104.

Aldworth does not dispute the Board's finding that on July 28, 1998--the date the Union requested recognition and bargaining--it had secured majority support as evidenced by union authorization cards signed by 58 of the 109 unit employees. (SA73,156;A727-33,783-57,877-89,931-38,941-43,972-74,1272,SSA8-10). Moreover, all the types of illegal acts highlighted by this Court in *Skyline* and *Traction* are present here.

B. The Board Reasonably Concluded that Aldworth's Unfair Labor Practices Rendered Slight the Possibility of Ensuring a Fair Election Through the Use of Traditional Remedies

Based on a lengthy and comprehensive analysis, the Board found (SA73-77) that Aldworth's prolonged and intensive campaign of unlawful conduct constituted the kind of interference with employee free choice that warrants a bargaining order. That analysis clearly supports a *Gissel* order under the *Traction* and *Skyline* standards discussed above.

Aldworth's unfair labor practices were both *deliberate* and *calculated*, involving numerous threats, promises and other unlawful statements and actions. Moreover, those statements and actions threatened *significant economic interests,*

repeatedly threatening plant closure and job loss as a result of unionization. Such threats "alone provide sufficient justification for [a] bargaining order." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1374 (D.C. Cir. 1983), and cases cited.

Aldworth's unlawful conduct also included *acts of reprisal* in the form of discharges and other actions against union supporters, including the discharge of Leo, the suspension of McCorry, the suspensions and transfers of the freezer employees, the discharge of Moss, and the discharge of seven employees pursuant to the unlawfully implemented SAP. Indeed, Roy gloated, telling the employees that the actions taken against union "poster boys" had brought about the desired effect of making all employees more "quiet," "concerned," and "afraid to speak." (SA76n.74;A711.)

Aldworth also made numerous *promises to correct the grievances* that led to the employees' efforts at unionization, including the reduction in the duties of unpopular Manager Knoble, the hiring of new Manager Kennedy, and the announcement of a new supervisory position for which the employees were invited to apply.

Finally, Aldworth's unlawful conduct included a lengthy and intensive *series* of unfair labor practices that continued up to and even beyond the election. Thus, the unfair labor practices discussed above were not only numerous, but also were accompanied by many other unfair labor practices, including Aldworth's

repeated unlawful threat to bargain from a "blank sheet of paper," its chilling of employee expression through a request that employees report union contacts from fellow employees as well as nonemployees, its threats of less favorable working conditions, and its coercive interrogation of a unit employee.

C. Aldworth's Challenges to the Bargaining Order are Without Merit

There is no merit to Aldworth's contention (Br4-8) that the Board's analysis of the need for a bargaining order failed to adequately balance considerations of the employees' Section 7 rights, the relationship between the employees' right to choose their bargaining representative and the Act's other purposes, and whether alternative remedies are adequate to cure the violations found.

The Board fully considered the impact on employee rights, explaining that a bargaining order will "provide the proper remedy to effectuate the wishes of the majority who have chosen union representation [by signing union authorization cards] and whose Section 7 rights have been infringed by [Aldworth's] unlawful conduct," and "do no injustice to the minority who may not support union representation" because their interests are adequately safeguarded by their right to file a decertification petition. (SA75-76.)

The Board also explained at length why alternative remedies were inadequate. As the Board noted (SA73-75), Aldworth's vice president committed "hallmark" violations of the Act, such as threats of job loss, discipline, and the

discharge of union supporters, that are most likely to cause union disaffection and unlikely to be forgotten. Moreover, the Board noted that the postelection violations in the form of more onerous work standards serve as a "daily reminder of the consequences of the thwarted organizational effort." The Board further observed that the effects of the postelection retaliatory discharges, suspensions, and reassignments "would reasonably continue to resonate among those still employed at the facility," while the continuing use of the issue report form and the presence of Manager Kennedy would have a similar effect.

In short, Aldworth's relentless unlawful antiunion campaign fully supports the Board's conclusion that the employees' wishes expressed by the authorization card majority can only be protected by a bargaining order. Indeed, this Court has enforced bargaining orders on the basis of employer misconduct much less comprehensive and egregious than that present here. *See for example, Garvey Marine, Inc. v. NLRB*, 245 F.3d at 823-28; *Traction Wholesale Center Co. v. NLRB*, 216 F.3d at 105-08. *See also Parts Depot, Inc*., 332 NLRB 670, 675 (2000), *enforced mem*., 24 Fed. Appx. 1 (D.C. Cir. 2001).

There is also no merit to Aldworth's contention (Br6-8) that the Board refused to give "appropriate consideration" to the impact of employee turnover, passage of time, and dissipation of the effects of its unlawful conduct between the time of their commission and the Board's order. As this Court has recognized,

employee turnover does not undermine the propriety of a bargaining order where the Board reasonably concludes that the employer's unfair labor practices are so egregious and pervasive that their effects are likely to persist despite turnover. *Garvey Marine, Inc. v. NLRB*, 245 F.3d at 828. *Accord Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 331 (D.C. Cir. 1989) (where Board finds unlawful conduct particularly pervasive or enduring, it "need make only minimal findings that the effects not been dissipated by subsequent employee turnover").

Here, the Board considered turnover and passage of time and reasonably determined (A76) that, "even considering such factors, . . . the effects of [Aldworth's] unlawful conduct are unlikely to have dissipated sufficiently to ensure a free election." The Board noted (*id*.) that many of Aldworth's violations were of a character that are unlikely to be forgotten, and likely to continue to resonate among those still employed, and perpetuate the antiunion environment created by Aldworth.

Finally, the Court is precluded from considering Aldworth's suggestion (Br7-8) that no bargaining order should issue because it lost its contract with Dunkin' on December 31, 2000, and no longer employs any bargaining unit employees. At no point between the issuance of the judge's decision on April 20, 2000, and the Board's on September 20, 2002, did Aldworth move the Board to reopen the record to include and to consider the fact it had lost the contract. Nor

did it move the Board to reconsider its decision to issue the bargaining order, though Aldworth's loss of the Dunkin' contract would hardly be newly discovered evidence in the fall of 2002. *See Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1377-78 (D.C. Cir. 2002). *See also NLRB v. USA Polymer Corp*., 275 F.3d 289, 297 (5th Cir. 2001).

Nor can Aldworth or Dunkin' claim that there is no remaining employer subject to the bargaining order, which runs against Aldworth and its successors. Between May 2000 and February 2002, the Union filed numerous unfair labor practice charges against Aldworth and Dunkin' alleging similar misconduct at the same facility. The General Counsel issued a complaint based on those charges on July 21, 2003, and both employers signed settlement agreements about a month later. In its agreement, Dunkin' admitted it was a successor to Aldworth under *Burns*[32] and *Golden State*,[33] and agreed to recognize and bargain with the Union, if this Court enforces the instant bargaining order.[34] In short, the Union has continued to protect the unit employees' exercise of their statutory rights.

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[32] *NLRB v. Burns Security Services*, 406 U.S. 272, 277-81 (1972).
[33] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184-87 (1973).
[34] For the Court's convenience, the complaint and settlement agreements are appended to the Board's brief.

VI. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ALDWORTH VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE BARGAINING AGENT REPRESENTING ITS UNIT EMPLOYEES AND BY UNILATERALLY IMPLEMENTING A NEW SELECTION ACCURACY PROGRAM AND DISCHARGING EMPLOYEES PURSUANT TO THAT PROGRAM

Where a union requests bargaining on the basis of a valid card majority and the employer's unfair labor practices warrant a bargaining order, the obligation to bargain is retroactive to the date on which the union requests bargaining and unfair labor practices have commenced. *Anna Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739, 744 (10th Cir. 1976); *Central Broadcast Co*., 280 NLRB 501 n.4 (1986). Accordingly, the rejection of that bargaining request constitutes a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.[35] In the instant case, the Union made a valid bargaining request on July 28, 1998, after the unfair labor practices had commenced, and Aldworth refused the request on July 30. Thus, substantial evidence supports the Board's finding (SA62,157) that Aldworth's refusal violated Section 8(a)(5) and (1) of the Act.

An employer with a bargaining obligation also violates Section 8(a)(5) and (1) of the Act by making changes in the employment terms and conditions of its

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[35] Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice to an employer "to refuse to bargain collectively with the representatives of its employees."

employees, without reaching an agreement with the union or bargaining in good faith until impasse is reached. *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 137 (D.C. Cir. 1999). Here, it is undisputed that Aldworth did not bargain with the Union prior to implementing its new SAP and discharging employees pursuant to that program. Accordingly, the Board was warranted in finding that the unilateral implementation of the program, and the discharges pursuant to it, violated Section 8(a)(5) of the Act as well as Section 8(a)(3).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter an order denying the Companies' petitions for review and enforcing the Board's order in full.

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WILLIAM M. BERNSTEIN
Senior Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2997

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

MARGARET A. GAINES
Supervisory Attorney

National Labor Relations Board

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